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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 575

WILLIAM ELMER BROWN, JR.,
Petitioner,

vs.

EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, NEW JERSEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

I.

Statement of Facts.

As of September 30, 1931, the Union National Bank of Atlantic City entered into a contract with the Atlantic City National Bank (R. 38-40), by the terms of which the Atlantic City National Bank took over all of the assets of the Union National Bank of Atlantic City and assumed all of its liabilities to depositors and creditors. The Union National Bank, in effect, warranted to the Atlantic City National Bank that the assets so conveyed would equal,

when liquidated, the amount of the liabilities assumed by the purchaser. The agreement further provided that the Atlantic City National Bank would liquidate the assets of the Union National Bank, said period of liquidation to terminate at the expiration of two years from the date of the agreement, at which time the liability of the Union National Bank to the Atlantic City National Bank would be determined by deducting from the indebtedness assumed by the Atlantic City National Bank: (1) the value of the bank building and fixtures at an agreed price of $353,000.00; and (2) the amount realized by the liquidation of the other assets of the Union National Bank as of the date of the expiration of the agreement (R. 39).

Immediately after the execution of this contract, the Atlantic City National Bank assumed all the deposit liability of the Union National Bank. The practical result of the agreement was that the former depositors of the Union National Bank became, in fact, depositors of the Atlantic City National Bank.

The contract was approved by the shareholders of the Union National Bank at a meeting held on December 15, 1931, and a resolution was adopted by said shareholders placing the Union National Bank in voluntary liquidation under the provisions of 12, U. S. C., Sec. 181 (*infra* p. 15), and appointing the Atlantic City National Bank liquidating agent (R. 35, 36).

Prior to and on the date of the contract of September 30, 1931, the petitioner here, William Elmer Brown, Jr., was the registered owner of ten shares of the capital stock of the Union National Bank of Atlantic City. On April 21, 1933, he filed a voluntary petition in bankruptcy and was as of that date adjudicated a bankrupt by the United States District Court for the District of New Jersey (R. 36).

In the schedules filed by Petitioner in the bankruptcy proceedings, he listed as one of the debts from which he

sought to be discharged, his possible liability to assessment on the ten shares of the capital stock of the Union National Bank of Atlantic City held by him (R. 37), although at the time of the filing of said petition in bankruptcy, no receiver for the Union National Bank had been appointed, and no assessment had been levied upon its stockholders, and the Union National Bank was not then in default to the Atlantic City National Bank under the terms of the said contract of September 30, 1931 (R. 3, 4; 38, 39, 40). Clarence Knauer was appointed trustee in bankruptcy of the Petitioner and as such trustee there came into his hands the ten shares of capital stock of the Union National Bank of Atlantic City registered in the name of and owned by the Petitioner (R. 31). Petitioner was discharged in bankruptcy on July 31, 1933 (R. 7), which, it will be observed, was two months prior to the date on which the Union National Bank became in default to the Atlantic City National Bank under the terms of said contract dated September 30, 1931 (R. 38-40).

The trustee, after investigation, concluded there was no equity in the stock and that it would be burdensome to the bankruptcy estate. Accordingly, he presented a petition to the Referee in Bankruptcy for authority to abandon all title to and disclaim all interest in the stock (R. 31). Pursuant thereto, the Referee in Bankruptcy, by order dated October 27, 1933, directed the trustee to abandon all title to and disclaim all interest in the stock (R. 32). The misapprehension of the court below, indicated in its original opinion (R. 70, 71), to the effect that the trustee did not obtain a court order authorizing a rejection of the stock as a burdensome asset, was corrected in its subsequent opinion after rehearing (R. 82, 83, 84).

On December 13, 1933, the Comptroller of the Currency determined that the Union National Bank was insolvent and appointed Respondent's predecessor in office, Laurence

A. Slaughter, Receiver of said bank (R. 27). On January 8, 1934, the Comptroller of the Currency levied a stock assessment of 100% upon the capital stock of the said bank, and directed respondent's predecessor to take all necessary proceedings by suit or otherwise to enforce to that extent the individual liability of the shareholders of the bank (R. 29). It will be observed that the date of the levy of the assessment was more than five months subsequent to the date of the Petitioner's discharge in bankruptcy (R. 7).

II.

Questions Presented.

We believe the statement in Petitioner's brief as to the questions presented is sufficient.

III.

Summary of Argument.

A. PETITIONER'S LIABILITY FOR STOCK ASSESSMENT WAS NOT A "PROVABLE DEBT" AS OF THE DATE OF THE FILING OF THE PETITION IN BANKRUPTCY AND THEREFORE WAS NOT DISCHARGED.

(1) Bases upon which claims are provable in bankruptcy.

(2) National bank shareholders' liability is statutory and where assessment is not levied until after filing of petition in bankruptcy the liability is not affected by discharge.

(3) Assuming for discussion only that the stock assessment liability is contractual, it is too contingent to be the basis of a provable debt and therefore is not affected by discharge.

B. REPLY TO PETITIONER'S ARGUMENTS.

(1) Discussion of principal cases relied upon by Petitioner.

(2) Shareholders' liability does not become enforceable until assessment is levied.

(3) Ownership of stock abandoned by trustee in bankruptcy remains vested in bankrupt.

IV.

ARGUMENT.

A.

PETITIONER'S LIABILITY FOR STOCK ASSESSMENT WAS NOT A "PROVABLE DEBT" AS OF THE DATE OF THE FILING OF THE PETITION IN BANKRUPTCY AND THEREFORE WAS NOT DISCHARGED.

(1) Bases upon which claims are provable in bankruptcy.

The only basis upon which claims are provable in bankruptcy, which needs to be discussed here, is the one upon which the Petitioner relies, i. e.:

> "(a) Debts of the bankrupt may be proved and allowed against his estate which are * * *; (4) founded upon an open account, or upon a contract express or implied; * * *" (11 U. S. C. 103 (a) 4).

The position of the Petitioner is that at the time he was adjudicated a bankrupt, his liability for the stock assessment was a debt founded upon "a contract express or implied" and that consequently, by virtue of his discharge in bankruptcy, he is relieved from the payment of the stock assessment subsequently levied by the Comptroller of the Currency (Petitioner's Brief p. 13).

Even as to claims based upon the foregoing provision of the Bankruptcy Act, the authorities are agreed that only those claims which *were fixed in amount or were susceptible of liquidation as of the date of the filing of the petition* in bankruptcy are provable.

In *Collier on Bankruptcy* (13th Ed.), Vol. II, p. 1375, it is stated:

> "The rule is that the provability of a claim depends upon its status at the time the petition is filed. If the

> *existence* of a debt or claim, liquidated or unliquidated, is contingent at the time of the filing of the petition, it is not provable, except claims of indorsers and sureties. Subsection a (4), unlike the other subdivisions, has no words of time but it has been authoritatively decided that debts founded upon open account or upon contracts, express or implied, include only such as *existed* at the time of the filing of the petition. The word 'and' in the form of proof prescribed by the Supreme Court requiring that it should state that the debt proved existed 'at and before the filing of the petition for adjudication of bankruptcy' must be construed either 'or' or 'and' as the circumstances may require." (Italics ours.)

In *Loveland on Bankruptcy*, Vol. I, Sec. 290, p. 597, it is stated:

> "The rights of creditors to prove debts and share in the distribution of the estate of the bankrupt are fixed by the status of their claims, *at the time of* filing the petition in bankruptcy." (Italics ours.)

In *Zavela* v. *Reeves*, 227 U. S. 625, at p. 631, Mr. Justice Pitney, speaking for this Court, said:

> "Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express or implied', not in terms referring to the time of the inception of the indebtedness. But, reading the whole of Sec. 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under *Sec. 63a, cl. 4 include only such as existed at the time of the filing of the petition in bankruptcy.*" (Italics ours.)

See also *Manhattan Properties* v. *Irving Trust Co.*, 291 U. S. 320, at p. 338.

(2) National bank shareholders' liability is statutory and where assessment is not levied until after filing of petition in bankruptcy the liability is not affected by discharge.

The Circuit Court of Appeals on re-hearing adopted the opinion of the trial court which held that under the facts in this case the obligation of the Petitioner for payment of the stock assessment did not arise out of contract express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom did not become due and owing until the levy of the assessment by the Comptroller of the Currency, which was subsequent to the Petitioner's adjudication and discharge in bankruptcy.

Consideration of the question of whether Petitioner's liability for the assessment was a "debt • • • founded upon a contract express or implied", which was in existence at the time of the filing of the bankruptcy petition, necessarily involves the construction of the statute upon which the liability is based and imposed. That provision of the National Bank Act recorded in 12 U. S. C., Sec. 64, provides in part as follows:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. • • •"

Prior to the decision in *McClaine* v. *Rankin*, 197 U. S. 154, this Court in several cases indicated that the liability of a stockholder of a national bank was contractual in its nature, although not deciding that it was *founded upon contract*. *Richmond* v. *Irons*, 121 U. S. 27, 55; *Matteson* v. *Dent*, 176 U. S. 521, 525.

Other decisions are to the effect that the liability is *founded both upon the statute and contract*. *U. S.* v. *Knox*, 102 U. S.

422, 424; *Concord First National Bank* v. *Hawkins*, 174 U. S. 364; *McDonald* v. *Thompson*, 184 U. S. 71, 73.

By reason of the facts in the following cases, it was determined that the liability was *based on the statute*. *Keyser* v. *Hitz*, 133 U. S. 138, 149; *Scott* v. *Deweese*, 181 U. S. 202, 213; *Studebaker* v. *Perry*, 184 U. S. 258, 261.

However, since the decision of this Court in *McClaine* v. *Rankin, supra*, it appears conclusively that the liability for assessment of a shareholder of a national bank is not founded upon contract, but arises by force of the statute upon which it is based. In that case it was held that a state statute limiting the time for bringing "an action upon a contract or liability, express or implied, which is not in writing and does not arise out of any written instrument", was not applicable in a suit for stock assessment liability brought by a receiver of an insolvent national bank, but that such class of cases fell within a limitation statute providing: "An action for relief, not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued." In the opinion at p. 161, this Court held that the provisions of 12 U. S. C. Sec. 64, creating the liability of stockholders of national banks for assessment

> "do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party. *The liability is a consequence of the breach by the corporation of its contract to pay, and is collateral and statutory.*" (Italics ours.)

and further at pp. 162, 163, said that the limitation statute

> "*ran as against an action to enforce the statutory liability and not an action for breach of contract*" (Italics ours.)

and at p. 162, that the liability was enforceable only according to the Federal statute,

> *"independent of which the cause of action does not exist"* (Italics ours.)

In the dissenting opinion, the effect of the majority decision was pointed to as definitely overruling previous cases classifying the liability as contractual.

In *Christopher* v. *Norvell,* 201 U. S. 216, at p. 228, this Court said that the liability was "created by the statute".

In *Forrest* v. *Jack,* 294 U. S. 158, 162, it is said:

> "The liability of stockholders is based upon the statute (12 U. S. C.), Section 64." (Insert ours.)

The latest expression of this Court on this point is found in *Pufahl* v. *Parks,* 299 U. S. 217, where Mr. Justice Roberts said at p. 222:

> "The liability is imposed by the statute. • • • From the moment of the Comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder • • • ."

Other courts have recognized that the basis of the stock assessment liability is statutory. See *Laurent* v. *Anderson,* 70 F. (2d) 819, 823; *Page* v. *Jones,* 7 F. (2d) 541, 544; *Donald* v. *Bird,* 85 F. (2d) 663, 664; *Armstrong* v. *McAdams,* 46 F. (2d) 931, 932, 933; *Hendrickson* v. *Helmer* (D. C. Idaho), 7 F. Supp. 627, 628.

In view of the foregoing discussion and authorities it is the Respondent's contention that the primary basis of the liability of the Petitioner is the statute, "• • • independent of which the cause of action does not exist • • • •" *McClaine* v. *Rankin, supra,* and that it is not a debt founded upon contract express or implied within the purview of Section 63 (a) 4 of the Bankruptcy Act (11 U. S. C. 103 (a) 4, *supra,* p. 5). Consequently under the facts in this case it is submitted that such liability was not a "provable debt" at the time of Petitioner's adjudication and discharge

in bankruptcy. For this reason the discharge in bankruptcy could not in any manner affect the Petitioner's liability for the stock assessment which was levied subsequent to the filing of his petition in bankruptcy.

(3) Assuming for discussion only that the stock assessment liability is contractual, it is too contingent to be the basis of a provable debt and therefore is not affected by discharge.

The liability was uncertain both as to amount and time. It was not even certain at the time the petition in bankruptcy was filed that a stock assessment *would ever be* levied against the shareholders of the Union National Bank. Furthermore, to admit or assert the existence of a provable claim in bankruptcy based upon this liability is to admit and assert the existence of a claimant. Yet, who could file claim?

The Union National Bank, although it was still, as of that date, a corporate entity, could not file claim because the statutory stock assessment liability does not run in favor of the bank but rather in favor of the creditors thereof (See *Page* v. *Jones*, 7 F. (2d) 541, cert. den. 269 U. S. 587; *Scott* v. *Latimer*, 89 Fed. 843, affirmed *Scott* v. *Deweese*, 181 U. S. 202; *Lantry* v. *Wallace*, 97 Fed. 865, affirmed 182 U. S. 536; *Wehby* v. *Spurway*, 30 Ariz. 274, 246 Pac. 759, cert. den. 273 U. S. 722) and because the levy of an assessment by the Comptroller of the Currency is a condition precedent to the enforcement of the liability of shareholders. *Kennedy* v. *Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Page* v. *Jones, supra.*

The purchasing bank (Atlantic City National Bank) and its receiver were precluded from filing claim against the bankruptcy estate of a stockholder of the Union National Bank because a condition precedent to the assertion of an assessment claim by a creditor against shareholders of a

bank in voluntary liquidation is the filing of an appropriate action in a proper court. See 12 U. S. C., Sec. 65 and *Taylor* v. *Fontaine*, 10 S. W. (2) 68, 72; *Williamson* v. *American Bank*, 115 Fed. 793, 797; *Ames* v. *American National Bank*, 176 S. E. 204, 223; and Opinion U. S. District Court (R. 56-58). Furthermore the purchasing bank was bound by the agreement between it and the Union National Bank dated September 30, 1931, wherein it was provided that

> "The amount of the liability of Seller shall be fixed at the expiration of two years from this date, * * *."

The question of whether an assessment would be levied against the shareholders of the selling bank *could not be determined before the expiration of the two-year period* or September 30, 1933, which was subsequent to the Petitioner's discharge in bankruptcy.

There was no other person or persons who could possibly file such claims against the bankruptcy estate, and if there was no one who could file claim, how could a bankruptcy court allow any such claim? In whose favor would the claim be allowed? And for what amount?

If in every instance where a shareholder of an insolvent national bank is adjudicated a bankrupt a claim must be filed against the bankruptcy estate in the maximum amount of a stock assessment which has not been levied, then a great hardship will have been imposed upon the other creditors of the bankrupt in the event, after distribution of dividends from the bankruptcy estate to the receiver of the insolvent national bank upon the claim thus filed, it is determined that an assessment need not be levied against the shareholders of that bank. In such a case, assuming that the bankrupt has been discharged and his estate fully liquidated, the receiver of the insolvent national bank would be placed in the position of having in his possession moneys to which the creditors of his trust were not entitled and to which the bankrupt was not entitled but

to which the creditors of the bankrupt were entitled, without any means or information upon which to make a distribution to such creditors.

The Respondent's position may be best presented by quoting from the decision of this Court in *Maynard* v. *Elliott*, 283 U. S. 273, 278:

> "The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor, and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach. In re Merrill & Baker, 186 Fed. 312. Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. Riggin v. Magwire, 15 Wall. 549. Or, the contingency may be such as to make any valuation of the claim impossible, even though liability has attached."

See also extracts from Dunbar v. Dunbar, 190 U. S. 340, 349, 350; Riggin v. Magwire, 15 Wall. 549, 551-552, and In re Pettingill & Co., 137 Fed. 143, 146-147. (Contained in Appendix, p. 24.)

It is submitted that the stock assessment liability of the petitioner was too contingent and uncertain to afford the basis of a provable claim against his bankruptcy estate; *ergo* the liability could not be affected by a discharge in bankruptcy. (For further discussion of the contingent nature of the assessment liability, see *infra*, pp. 16-17.)

B.

REPLY TO PETITIONER'S ARGUMENTS.

(1) Discussion of principal cases relied upon by Petitioner.

In the case of *Maynard* v. *Elliott*, 283 U. S. 273, strongly relied upon by the petitioner for the proposition that the assessment liability in this case was a "provable debt", it appears from the facts that the bankrupts were endorsers upon certain promissory notes which had not matured at

the time of bankruptcy, and upon which notice of dishonor had not been waived. This Court held that the future and contingent liability of an endorser of commercial paper executed before, but maturing after, the filing of the petition in bankruptcy, was a debt founded upon an express contract provable in a bankruptcy proceeding, and said at p. 278:

> "The claim against the endorser of paper not matured at the time of the bankruptcy thus stands on the same plane as contracts of suretyship or guarantee of payment of a debt not due until after the bankruptcy."

However, the statutory liability for assessment of a shareholder in a national bank is not analogous or comparable to the liability of a surety. This was definitely determined by this Court in *McClaine* v. *Rankin, supra,* where at p. 161, it said:

> "But the words of Sec. 5151 (12 U. S. C. 63), do not mean that the stockholder promises the creditor as surety for the debts of the corporation, but merely impose a liability on him as secondary to those debts, which debts remain distinct, and to which the stockholder is not a party." (Insert ours.)

See also *Hobart* v. *Johnson,* 8 Fed. 493, 495, and *Ames* v. *American National Bank of Portsmouth* (Va.), 176 S. E. 204, 224.

The case of *Maynard* v. *Elliott, supra,* is not authority for the Petitioner's position, but is, in effect, authority as aforenoted (*supra,* p. 12) for the Respondent's position that even though it be assumed that the Petitioner's stock assessment liability is founded upon a contract, express or implied, the liability is too contingent to be made the subject of a provable claim in bankruptcy.

The recent case of *Erickson* v. *Richardson* (C. C. A. 9th) 86 F. (2d) 963, cited by Petitioner appears to be the strong-

est support for his contention that the assessment liability in this case is a debt founded upon a contract, express or implied. It is believed that there are certain distinguishing features to which the Court's attention may be directed:

First, in the *Erickson* case it appears that at the time the shareholder was adjudicated a bankrupt the bank had been declared insolvent, was in the possession and custody of the Superintendent of Banks of the State of California and the assessment was levied about two months after the date upon which the petition in bankruptcy was filed. In the instant case, the Union National Bank, although placed in voluntary liquidation under 12 U. S. C., Sec. 181, had not been declared insolvent, was not in the possession and custody of the Comptroller of the Currency or a receiver appointed by him, and as stated aforesaid, the question of the necessity for an assessment was governed by the express terms of the liquidating agreement between the two banks providing for an accounting in September, 1933, which date was approximately five months subsequent to the Petitioner's adjudication in bankruptcy.

Second, in the *Erickson* case the trustee in bankruptcy had not abandoned the bank stock, whereas in the instant case the trustee in bankruptcy, by order duly entered in the bankruptcy proceedings, disclaimed and abandoned the stock, thus revesting the title thereto in the bankrupt.

Third, in the *Erickson* case the Court, in holding that the assessment claim was a debt arising out of contract and consequently provable in bankruptcy, followed the construction placed upon the Constitution of the State of California by the highest court of that State.

Under the facts in the instant case, it is believed that the dissenting opinion of Circuit Judge Haney in the *Erickson* case correctly sets forth the law applicable to the question of the nature of the assessment liability of a shareholder

of an insolvent national bank, *i. e.*, whether contractual or statutory.

(2) Shareholders' liability becomes enforceable when assessment is levied.

The Petitioner asserts that at the time of his adjudication as a bankrupt, the Union National Bank was insolvent and had been insolvent since September 30, 1931, at which time, for the purposes of liquidation, it sold its assets to the Atlantic City National Bank, and that by reason of its insolvency it was possible to fix his liability for stock assessment at the time of the bankruptcy proceedings. The liquidation contract between the two banks, dated September 30, 1931, expressly provided that:

> "The amount of the liability of Seller shall be fixed at the expiration of two years from this date, at which time all notes regardless of renewals thereof which shall then be uncollected by Buyer, shall be deemed losses."

The fact that the shareholders of the Union National Bank placed it in voluntary liquidation under the provisions of 12 U. S. C., Sec. 181, effective as of December 15, 1931, does not have any bearing whatever upon the question of the solvency or insolvency of that institution. The following statutes are applicable:

12 U. S. C., Sec. 181:

> "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

12 U. S. C., Sec. 65:

> "When any national banking association shall have gone into liquidation under the provisions of section 181 of this title, the individual liability of the shareholders provided for by section 63 of this title may be enforced by any creditor of such association, by bill in

> equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

The Petitioner claims that under the facts of this case, the foregoing sections of the National Bank Act so operated as to bring into existence and make due and owing, the individual liability of the shareholders of the Union National Bank upon its decision to go into voluntary liquidation. It should be clear that no such result can be read into these provisions because it is well settled that placing the corporation into voluntary liquidation under the statute, does not put an end to the corporate existence of the bank, *Central National Bank* v. *Connecticut Mutual Life Insurance Co.*, 104 U. S. 54, 73-76; nor does it import insolvency of the bank. See *Southwest National Bank* v. *Farracy*, 50 F. (2d) 959, 960, 961; *Green* v. *Bennett*, 110 S. W. 108, 115.

It is submitted that although 12 U. S. C., Sec. 65 does authorize any creditor of a national bank in voluntary liquidation to enforce the shareholders' liability by bill in equity, it would seem clear that said section could have no application to the instant case inasmuch as there was no certainty at the time of the adjudication of Petitioner in bankruptcy (April 21, 1933), that there *would be* any liability of the Union National Bank to the Atlantic City National Bank for which the shareholders of the former would be responsible, and the question of liability was not subject to determination, under the contract, until September, 1933; furthermore, even though it might have been considered, on April 21, 1933, that a possibility existed that in September, 1933, a deficiency would be fixed under the contract, there was no certainty that an assessment would be levied to meet the deficiency. It is common knowl-

edge that banks which have been placed in receivership on the ground of insolvency, not infrequently pay out 100% to depositors and creditors without the levy of an assessment due to subsequent appreciation in value of assets or reduction of liabilities. (See annual reports of Comptroller of Currency to Congress; see also 12 U. S. C. Sec. 197, indicating that Congress contemplated there would be cases of receivership banks wherein a surplus would be returnable to shareholders after payment of creditors in full.) The same situation could conceivably exist as to a bank in voluntary liquidation. Finally in this connection even if it were contemplated on April 21, 1933, first, that a liability would arise under the contract and second, that an assessment might be levied, there *was* no certainty, and there *could be* no certainty, as to the amount of assessment which might be necessary to be levied, *i. e.*, whether it would be a 25% or a 50% or a 100% assessment. Until the amount of assessment is fixed, either by levy by the Comptroller (in case of receivership) or by decree of court under 12 U. S. C. Sec. 65 (in case of voluntary liquidation) no cause of action arises, and the amount of the assessment, if any, cannot be known. **Obviously with all of these uncertainties involved, the assessment claim would be too contingent a liability to admit of filing in a bankruptcy proceeding and to be the basis of the payment of dividends thereon to the claimant filing it.**

An analysis of the cases instituted under authority of 12 U. S. C., Sec. 65 and relied upon by the petitioner for the proposition that his liability to assessment was capable of liquidation and enforcement reveals that in each instance the bill was filed on behalf of a creditor of the bank whose claim was at that time, due, owing, and certain in amount. *See Wyman* v. *Wallace*, 201 U. S. 230, 232, 242; *Hightower* v. *American National Bank*, 263 U. S. 351, 352, 353; *Richmond* v. *Irons*, 121 U. S. 27, 28; *American National Bank* v. *Commercial National Bank*, 254 Fed. 249, 257, 258.

Notwithstanding the fact that the Union National Bank was in voluntary liquidation until December of 1933, at which time a receiver was appointed, *a cause of action did not arise against the Petitioner for the assessment until the levy of the assessment against the shareholders* of the Union National Bank by the Comptroller of the Currency, after the bank had been declared insolvent and a receiver appointed to take possession and custody of its assets. *Forrest* v. *Jack*, 294 U. S. 158, 162; *Kennedy* v. *Gibson*, 8 Wall. 498, 505; *Deweese* v. *Smith*, 106 Fed. 438, 441, aff. 187 U. S. 637; *King* v. *Pomeroy*, 121 Fed. 287, 297-8; *Aldrich* v. *Skinner*, 98 Fed. 375, 377.

The courts have consistently recognized the discretionary authority granted the Comptroller of the Currency under the National Banking Laws to levy assessments against shareholders of insolvent national banks being liquidated under his supervision, and have uniformly held that his judgment and discretion in this connection is final and conclusive. *Kennedy* v. *Gibson*, 8 Wall. 498, 505; *Casey* v. *Galli*, 94 U. S. 673, 677; *Germania National Bank* v. *Case*, 99 U. S. 628, 634, 635; *United States* v. *Knox*, 102 U. S. 422, 425; *Bushnell* v. *Leland*, 164 U. S. 684; *Forrest* v. *Jack*, 294 U. S. 158, 162.

(3) Ownership of stock abandoned by trustee in bankruptcy remains vested in bankrupt.

Petitioner in his answer in the trial court had filed the following Affirmative Defense (R. 6, 7):

> "1. On April 21, 1933, defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey and all right, title and interest of the defendant in and to the said ten shares of stock by act of law was immediately transferred to and vested in the trustee duly appointed for said defendant bank-

rupt, whereupon the defendant lost all dominion and control over the said shares of stock.

"2. Said trustee has not disclaimed title to the said ten shares of stock to defendant.

"3. At the date of the assessment levied as aforesaid defendant in law and in fact was not the legal or equitable owner of said ten shares of the stock of said Union National Bank of Atlantic City, N. J., upon which said assessment was levied.

"4. The title to said stock was transferred to and vested in the said trustee by act of law more than sixty days prior to the appointment of the said receiver."

Respondent moved to strike this defense as being sham, because the Trustee in Bankruptcy had, in fact, disclaimed title to the stock; and in support of this motion, filed the Affidavit of the Trustee with the Order of the Referee in Bankruptcy dated October 27, 1933, directing the abandonment (R. 31, 32) annexed thereto. During the argument before the trial court on this motion, Petitioner specifically consented to the striking of the first defense thereby admitting that he was the owner of the stock at the time the assessment was levied. This clearly appears from the following portion of the opinion of the trial court, which was adopted by the Circuit Court of Appeals. (R. 47, 48, 83):

"In the complaint it is alleged that defendant at the time the assessment was levied owned ten shares of the capital stock of the bank, of a par value of $100 per share. The assessment, made on January 8, 1934, was 100 per cent. The defendant's alleged liability is $1000. The answer admits all of the material allegations of the complaint, but sets up thirteen separate defenses as a bar to the action. The first defense states that defendant was adjudicated a bankrupt on April 21, 1933, and that by reason thereof from that time on he was not the legal or equitable owner of said shares of stock, and consequently is not liable for the assessment. It is not

necessary to discuss this defense as defendant in his brief consents that it be stricken."

Petitioner urges in his brief (p. 7) that the first defense was merely surplusage and that the striking thereof did not prove him to be the owner of the stock. Obviously, by admitting that the title to the stock was not in the trustee, it must logically follow that the ownership was in Petitioner, inasmuch as the stock still continues to stand in his name on the books of the bank. That the record owner may be held liable for the assessment is settled by the decisions of this Court. *Whitney* v. *Butler,* 118 U. S. 655, 660; *Richmond* v. *Irons,* 121 U. S. 27, 58; *Matteson* v. *Dent,* 176 U. S. 521, 530; *Forrest* v. *Jack,* 294 U. S. 158, 162.

Assuming for discussion only, that Petitioner did not, upon the pleadings, admit ownership of the stock (as found by the trial court and Circuit Court of Appeals), it is respectfully submitted that upon the election of the trustee to reject the stock, and the entry of the order of disclaimer and abandonment of the same by him, the title and ownership of the stock remained in or reverted to the bankrupt by operation of law. In *Remington on Bankruptcy,* Volume 2, Sec. 1159, p. 499, it is said:

> "Upon abandonment title revests in the bankrupt, subject, of course, to all undischarged liens, etc."

In *Loveland on Bankruptcy,* Volume 1, Sec. 375, p. 774, the author states:

> "Where the trustee elects not to take the property or right of the bankrupt and charge the estate with it, the property and right whatever it is, remains in the bankrupt."

In the case of *In re Frazin,* 183 Fed. 28, Circuit Judge Noyes, speaking for the Circuit Court of Appeals for the Second Circuit, after reviewing all the cases, said, at p. 32:

"In our opinion, upon principle and authority, a trustee, having the option to assume or reject a lease, takes title to such lease only in case he elect to accept it. If he elect to accept it, then, by virtue of the provision of the bankruptcy act already quoted, the vesting of the title relates back to the date of adjudication. But, if the trustee do not elect to accept the lease, it remains the property of the bankrupt."

In *Mills Novelty Co.* v. *Monarch Tool and Mfg. Co.* (C. C. A. 6), 49 F. (2d) 28, the Court said on page 31:

"Some property, however, may carry such burdens that the trustee is not obliged to accept, but has an election to accept or reject, and the title does not pass to and vest to him in the same unconditional way. Where there is property of this character, it would seem that the title passes to the trustee upon condition subsequent. If he decides not to accept, the implied condition is broken and the title revests in the bankrupt—if indeed there has ever been more than a tender of the title. In the event of such rejection, it is clear that no formal conveyance by the trustee to the bankrupt is required. Sessions *v.* Romadka, 145 U. S. 29, 39, 12 S. Ct. 799, 36 L. Ed. 609."

In *Sessions* v. *Romadka,* 145 U. S. 29, Mr. Justice Brown, in discussing the effect of an abandonment by an assignee in bankruptcy of property of a bankrupt under the bankruptcy law of 1867, said at pp. 51-52:

"In such case the abandonment relates back to the commencement of the proceedings in bankruptcy, and the title stands as if no assignment had been made. Such abandonment is not so much a transfer of an existing interest in the assignee, as an election on his part to treat the assignment as having never included that claim."

See also *Mesirov Trustee* v. *Innis Speiden & Co.,* 88 N. J. L. 548, 550, 97 Atl. 160, 161; *Smith* v. *Wahl,* 88 N. J. L. 623, 97 Atl. 261; *Kirstein Holding Co.* v. *Bangor Veritas, Inc.* (Me.),

163 Atl. 655, 656; *Fleming* v. *Courtenay* (Me.), 57 Atl. 592, 595.

If the trustee does not dispose of the bankrupt's property in the ordinary course of administration, and rejects the property as a burdensome asset, to whom does it then belong? Not to the trustee, because he has rejected it. Not to the creditors of the estate, because they are represented by the trustee, who has renounced it. In such a case it appears that title must and should remain in the bankrupt, regardless of the lack of any affirmative action on his part. An analogy is found where a trustee in bankruptcy (prior to the recent amendments to the bankruptcy act) declined to accept a leasehold interest of the bankrupt. In such a case when the trustee rejected the lease, the term remained vested in the bankrupt without any affirmative action on his part whatsoever, and he continued to be liable for the rent accruing during the balance of the term. See the remarks of Mr. Justice Roberts in *City Bank Farmers' Trust Company* v. *Irving Trust Company, et al.* (No. 260, October Term, 1936), decided January 4, 1937.

The Court's attention is directed to the fact that in most of the cases above cited on this point there was no formal order directing the trustee to disclaim. In such cases, however, it was held the facts showed an election on the part of the trustee to reject, with the result that the property remained vested in the bankrupt. *A fortiori* in the instant case, a formal order having been entered directing the trustee to disclaim title to the stock in question, it remained vested in Petitioner and he continued to be the owner thereof.

Conclusion.

It is respectfully submitted that the opinion of the District Court and Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX.

In *Riggin* v. *Magwire*, 15 Wall. 549, 551-552, this Court stated:

> "It is argued that under the right given by the fifth section of the Bankruptcy Act of 1841 to prove "uncertain and contingent demands," the claim in this case could have been proven under the act. But the better opinion is, that as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the act of 1841. See 1 Smith's Leading Cases, notes to Mills *v.* Auriol, by Hare. In 1843 Martin Thomas was still living, and there was no certainty that his wife would ever survive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated or reduced to present or probable value? • • • But, without authority from the statute, the assignee would not have been justified in receiving such an estimate and making a dividend on it."

In *Dunbar* v. *Dunbar*, 190 U. S. 340, 349-350, it was stated:

> "Section 63*a* (of the Bankruptcy Act of 1898) provides for debts which may be proved, which, among others, are (1) 'A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest;' (4) 'founded upon an open account, or upon a contract express or implied.'
>
> "In section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated

upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph *b*, however, adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63*a*, to be liquidated as the court should direct.

"We do not think that by the use of the language in section 63*a* it was intended **to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.**" (Insert ours.)

In re Pettingill & Co. et al., 137 Fed. 143, 145-147, it is stated:

"The court has, therefore, to consider if the claim of Peters against Pettingill at the time the petition was filed was a provable claim within section 63*a* of the bankrupt act. It cannot be brought within clauses (1), (2), (3), or (5). If provable, it must be so because it is a claim founded upon a contract within the definition of clause (4); but not every liability founded upon a contract can be proved in bankruptcy. This was decided of a covenant to pay an annuity to a woman *dum sola* (Dunbar *v.* Dunbar, 190 U. S. 340 • • •); and it has often been decided of covenants to pay rent, in so far as the rent accrues after bankruptcy. These claims are disallowed, not because they are not founded upon contract, but because at the filing of the petition, the time when the status of the claim is fixed, the damages arising from the breach of contract are so far contingent that they cannot be computed by any process known to law. • • •

"Some statutes of bankruptcy, indeed, by express language admit to proof some claims which could not be liquidated in any action at law or in equity brought at the time of bankruptcy. In some sense these statutes empower a court of bankruptcy, in the language of the Supreme Court in Dunbar *v.* Dunbar, to guess

at the creditor's damage. And this course has some advantages, for the bankrupt is thus relieved from liabilities which otherwise would hamper him after his discharge. The act of 1898, however, authorizes none of these guesses, and admits to proof only those claims which can be liquidated by legal proceedings instituted at the time of bankruptcy. Other liabilities of the bankrupt are deemed so far contingent that they cannot be proved in bankruptcy, nor are they released by the bankrupt's discharge.

* * * * * * *

"It sems, therefore, that the test of provability under the act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under section 63*b* * * *."